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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 42

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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No. .....

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Fred L. Shuttlesworth prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above-entitled cause on November 9, 1967.

Opinions Below

The opinion of the Supreme Court of Alabama is reported at 206 So. 2d 348. The opinion and judgment of the Supreme Court of Alabama are set forth, Appendix, pp. 1a-16a, *infra*. The opinions in the Court of Appeals of Alabama, Sixth Division, are at 43 Ala. App. 68, 180 So. 2d 114 (1965), Appendix, pp. 17a-80a, *infra*.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered November 9, 1967 (R. II, 24).[1] On January 27, 1968, Mr. Justice Black extended the time in which to file this petition for writ of certiorari to and including March 8, 1968.

Jurisdiction of the Court is invoked pursuant to 28 U. S. C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Petitioner was convicted of parading without a permit, in violation of the Birmingham parade ordinance. Petitioner had ignored the permit requirement because its grant of overbroad discretionary licensing power rendered it patently offensive to the First and Fourteenth Amendments and because there were no Alabama procedures for effective and timely administrative decision-making and judicial review. On appeal, after the Alabama Court of Appeals had declared the ordinance unconstitutional on its face and reversed petitioner's conviction, the Supreme Court of Alabama purported to excise the constitutionally offensive portions of the ordinance, retroactively validated it and affirmed petitioner's conviction. Under these circumstances, was petitioner denied due process of law?

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[1] The record is in two volumes, herein designated as R. I (containing the proceedings in the Court of Appeals of Alabama) and R. II (containing the proceedings in the Supreme Court of Alabama).

2. Did the application of the Birmingham parade ordinance to petitioner deny him due process of law because it provided him no fair notice that he was required to secure a parade permit:

a) Because prior decisions of this Court taught petitioner that he need not submit to a permit ordinance patently offensive to the First and Fourteenth Amendments which could not be saved short of repeal; and,

b) Because he had no fair notice that his participation in a peaceful, orderly and nonobstructive walk along the sidewalks of Birmingham would be held to constitute a parade?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following ordinance of the City of Birmingham, a municipal corporation of the State of Alabama:

GENERAL CODE OF CITY OF BIRMINGHAM, ALABAMA (1944), § 1159

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable

number of persons; vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

Statement of the Case

This case tests the right of citizens of Birmingham, Alabama to stand on, or walk along, the public sidewalks of that city in a peaceful, orderly and nonobstructive manner.[2]

Petitioner Fred L. Shuttlesworth, a Negro minister, is a "'notorious' person in the field of civil rights in Birmingham."[3] Toward such a notorious person, "[t]he attitude

[2] Recently, in *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965), the Court struck down petitioner Shuttlesworth's conviction under another Birmingham city ordinance which, literally read, said that "a person can stand on a public sidewalk in Birmingham only at the whim of any police officer of that city" (382 U. S. at 90).

[3] *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 102 (1965) (concurring opinion of Fortas, *J.*).

of the city administration in general and of its Police Commissioner in particular are a matter of public record, of course, and are familiar to this Court from previous litigation. See *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963); *Gober* v. *City of Birmingham*, 373 U. S. 374 (1963); *In re Shuttlesworth*, 369 U. S. 35 (1962)."[4]

Petitioner Shuttlesworth seeks review of his conviction for taking part in a peaceful protest demonstration in Birmingham on Good Friday, April 12, 1963—a time "when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought."[5] Trials of approximately 1500 other demonstrators, charged, like petitioner, only under the Birmingham parade ordinance, are pending the outcome of this case.

Good Friday was a pivotal day in the historic civil rights campaign of petitioner Shuttlesworth and others involved in the movement of that period. At about noon, a crowd began to gather in a church in the 1400 block of Sixth Avenue (R. I, 67). Police officers were stationed outside to watch for signs of a demonstration (R. I, 35, 43, 48). A large number of photographers (R. I, 53) and onlookers gathered (R. I, 45).

At about 2:15 p.m., 52 persons emerged from the church (R. I, 41, 44-45). They formed up in pairs on the side-

[4] *Walker* v. *City of Birmingham*, 388 U. S. 307, 325, n. 1 (1967) (dissenting opinion of Warren, *C.J.*).

[5] *Walker* v. *City of Birmingham*, 388 U. S. 307, 338-39 (1967) (dissenting opinion of Brennan, *J.*).

walk and began to walk in a peaceful, orderly and non-obstructive way toward City Hall (R. I, 35, 37, 39, 41, 44-46, 62-63, 65, 67).[6] They walked about forty inches apart, carried no signs or placards and observed all traffic lights (R. I, 37, 39). At times they sang (R. I, 26, 35, 55).

Petitioner was not paired off; he was at times observed near various points of the column, but at other times he was not near the column at all (R. I, 25-26, 37, 39-40, 46-48, 54-55, 61-62, 64-68, 70-71).

The walk proceeded about four blocks—to the 1700 block of Fifth Avenue—where all the participants were arrested (R. 25, 38, 45). The whole episode took 15 to 30 minutes (R. I, 28). Petitioner was arrested some two hours later at his motel (R. I, 71-72).

There was no evidence that petitioner had applied for a parade permit. The parade permit book, a clerk in the city Clerk's office testified, contained no parade permit for Good Friday (R. I, 31). The clerk testified that she had never noticed—or issued a permit for—a "parade" on the sidewalks of Birmingham (R. I, 33). For example, it was not the practice to issue permits for a group of Boy Scouts forming up to board a bus (R. I, 33). The practice *was* to issue permits for parades in the streets, having bands and vehicles (R. I, 33). The following exchange occurred (R. I, 33):

> Q. Mrs. Naugher, I believe you said you have been clerk for seventeen years. A. Yes.

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[6] One police officer testified the group was 4 to 6 abreast (R. I, 23-24), but, in the context of his and other police officers' testimony (R. I, 40-41, 44-46, 56), it is clear that the Alabama Court of Appeals was correct in concluding that this "bunching up coincided with the promenaders being blocked by officers parking police cars athwart the crossing" where they were arrested (R. I, 83).

Q. You have seen a number of these parades, haven't you? A. Yes.

Q. Have you noticed a parade down the streets or on the sidewalk? A. In the streets.

Q. All in the street? A. Yes.

Q. And did you notice whether or not these parades would have bands or vehicles in the procession? A. Yes.

Q. They would? A. Yes.

Q. And does one get a permit to picket, or just to parade? A. No.

Q. Does one get a permit to just walk down the street? A. No.

Q. Do you know whether or not at time when a group of Boy Scouts or Girl Scouts were going to load up on the bus, whether or not they would have to get a permit to get to the bus?

The Court: That would be a legal question and she wouldn't be competent.

Mr. Billingsley: The vital question is whether or not—what she has in the book there.

A. We have not issued any.

The complaint against petitioner charged that he "did take part or participate in a parade or procession on the streets of the City without having secured a permit therefor from the commission, contrary to and in violation of Section 1159 of the General City Code of Birmingham" (R. I, 3).

October 1, 1963, petitioner was tried before a jury in the Circuit Court of the Tenth Judicial Circuit, convicted and sentenced to 90 days hard labor and an additional 48 days

hard labor for failure to pay the fine of $75.00 and costs of $28.00 (R. I, 9-10).[7]

November 2, 1965, the Court of Appeals of Alabama, Sixth Division, reversed petitioner's conviction, holding (R. I, 119-20; App., pp. 69a-70a, *infra*, 180 So. 2d 114, 140-41):

> (1) § 1159 of the 1944 General Code of the City of Birmingham, certainly as to the use of sidewalks by pedestrians, is void for vagueness because of overbroad, and consequently meaningless, standards for the issuance of permits for processions; (2) said § 1159 has been enforced in a pattern without regard to even the meaning here claimed for by the City to such an extent as to make it unconstitutional as applied to pedestrians using the sidewalks; and (3) the City failed to make a case, under the purported meaning of § 1159, of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

November 9, 1967, the Supreme Court of Alabama reversed the Court of Appeals, rejecting all three bases of that court's decision (R. II, 6-23; App., pp. 1a-14a, *infra*). The Supreme Court held that § 1159 was not void on its face (R. II, 20; App., p. 11a, *infra*), that § 1159 had not been unconstitutionally applied to petitioner (R. II, 20; App., p. 11a, *infra*) and that there was sufficient evidence

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[7] Earlier, on May 15, 1963, petitioner was tried and convicted in the Recorder's Court of the City of Birmingham and sentenced to 180 days hard labor and a fine of $100.00 (R. I, 2). From this judgment, petitioner took an appeal to the Circuit Court for trial *de novo*.

of petitioner's violation of § 1159 (R. II, 21; App., p. 12a, *infra*).

The Court based its holding upon this Court's decisions in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967) and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (R. II, 19-20; App., pp. 11a-14a, *infra*). The Court held that *Walker* and *Cox* required reversal of the Court of Appeals' voiding of the Birmingham parade ordinance, notwithstanding this Court had explicitly refused to rule on the ordinance's validity (388 U. S. at 316-17). The Court conceded that its reliance upon *Walker* and *Cox* might be misplaced,[8] but concluded (R. II; 23; App., pp. 13a-14a, *infra*): "If so, we will no doubt be set straight."[9]

How the Federal Questions Were Raised and Decided Below

In the circuit court, petitioner raised the federal questions presented here by demurrer (R. I, 4-5), by motion to exclude the testimony and for judgment (R. I, 8, 59-60) and motion for new trial (R. I, 12-14). All these motions were overruled (R. I, 18, 60, 11).

The Court of Appeals of Alabama treated petitioner's assignment of errors (R. I, 80) as presenting the following three questions for decision (R. I, 82; App., p. 18a, *infra;* 180 So. 2d at 116):

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[8] "Perhaps we have placed too much reliance on *Walker* v. *City of Birmingham*, 388 U. S. 307 and on *Cox* v. *New Hampshire*, 312 U. S. 569. We may have misinterpreted the opinions in these cases" (R. II, 23; App., pp. 13a-14a, *infra*).

[9] On December 4, 1967, the Supreme Court of Alabama entered a stay pending certiorari (R. II, 29-30).

(1) Whether § 1159, *supra,* denies, on its face, due process of law; (2) whether or not the ordinance as applied violates *Yick Wo* v. *Hopkins,* 118 U. S. 356; and (3) the sufficiency of the evidence.

These issues were resolved favorably to petitioner (R. I, 81-120; App., pp. 17a-70a, *infra;* 180 So. 2d 114-41), one Judge dissenting (R. I, 121-29; App., pp. 70a-80a; 180 So. 2d 141-45).

The Supreme Court of Alabama stated the federal questions presented in the following terms (R. II, 9; App., p. 3a, *infra*): 1) Whether "§ 1159 is void on its face because of overbroad and consequently meaningless standards for the issuance of permits for parades or processions"; 2) Whether § 1159 "has been enforced by the City of Birmingham in such a way as to make it unconstitutional"; and 3) Whether "the evidence adduced by the City of Birmingham in the trial in the circuit court was insufficient to present a jury question as to whether Shuttlesworth had, in fact, been engaged in a parade, procession or other public demonstration in the streets or other public ways of the City of Birmingham without first having obtained a permit as required by § 1159."

All these issues were resolved adversely to petitioner on federal constitutional grounds (R. II, 6-23; App., pp. 1a-14a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Decide Whether the Court Below Misapplied This Court's Decisions in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), so as to Bring Them Into Conflict With *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Staub* v. *Baxley*, 355 U. S. 313 (1958).

In rejecting petitioner's claim that the Birmingham parade ordinance, § 1159 of the General City Code of Birmingham, was unconstitutional on its face, the court below placed great reliance upon this Court's decision in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967).[10] Quoting a phrase in the *Walker* opinion to the effect that "it could not be assumed [§ 1159] . . . was void on its face" (388 U. S. at 317), the Alabama Supreme Court held that *Walker* "seems to us to be in direct conflict with the conclusion reached in the majority opinion of the Court of Appeals of Alabama here under review" (R. II, 19-20; App., p. 11).

But to read *Walker* as supporting the facial constitutionality of a licensing ordinance such as § 1159 is a dangerous distortion of this Court's decision which the Court should quickly correct before it gains currency in the lower courts. In *Walker*, the Court merely refused to disturb Alabama's ruling that the validity of the ordinance and the injunction embodying it could not be tested in a criminal contempt proceeding. It was in this context that

[10] R. II, 16-23; App., pp. 9a-14a, *infra*.

the prevailing opinion said that the ordinance could not "be assumed" to be void. The Court was thus far from sustaining the constitutionality of § 1159; to the contrary, it noted that the "generality" of the ordinance's language unquestionably raised "substantial constitutional issues" (388 U. S. at 316). And the Chief Justice, in a dissenting opinion which Justices Brennan and Fortas joined, expressed the belief that § 1159 was "patently unconstitutional on its face" (388 U. S. at 328).

The effect of the decision below is to convert *Walker* and *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), into a two-pronged instrument for the validation and perpetuation of unconstitutional licensing regimes. If this device succeeds, it will effectively destroy the salutary principle long adhered to by this Court as an indispensable element of the protection afforded free expression against impermissible censorship: the principle of cases such as *Lovell* v. *Griffin*, 303 U. S. 444 (1938), and *Staub* v. *Baxley*, 355 U. S. 313 (1958), that a facially unconstitutional licensing law is wholly void and need not be complied with.

Under § 1159 as written, and as it confronted petitioner Shuttlesworth in 1963, the Birmingham licensing authority is granted power to withhold a parade permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" require it. A more explicit grant of unconstitutional censorial power can hardly be imagined.[11] If, in supposed reliance upon

[11] "When local officials are given totally unfettered discretion to decide whether a proposed demonstration is consistent with 'public welfare, peace, safety, health, decency, good order, morals or convenience,' as they were in this case, they are invited to act as censors over the views that may be presented to the public" (*Walker* v. *City of Birmingham*, *supra*, 388 U. S. at 329) (dissenting opinion of Warren, *C.J.*). See authorities collected in note 15, *infra*.

Walker, such an ordinance can be retroactively rewritten so as to save its constitutionality by excising most of its operative language, there is no licensing legislation that cannot be similarly sustained. And if, as the court below interpreted the doctrine of *Cox,* the post-operative shape of the legislation warrants imposing criminal liability upon those who read it as it was written and decline to comply with a palpably unconstitutional censorship scheme, the consequence is clear and frightening. *Lovell* v. *Griffin* is dead; *Staub* v. *Baxley* is dead; every licensing regulation—however broad the discretionary power it appears to confer upon the licensing authorities over the activities of the persons required to be licensed—must be obeyed.

The resultant damper on constitutionally guaranteed freedoms of expression is obvious. The States are permitted and encouraged to hold out a broad and overhanging threat of greater censorship than the Constitution permits them to exact. So long as the threat is effective and fear of attendant criminal penalties discourages challenge to it, the censorship exerts its full, unconstitutional repressive effect. When and if a challenge is mounted, the state courts (which may or may not be the highest court of a state) announce that the statutory regulation does not mean what it plainly says, and—without removing the overbroad language from the statute books, where it remains to be invoked by the licenser and to cow laymen subject to regulation under it—give it some *post hoc* verbal construction designed and sufficient to bring it barely back across the line of constitutional condemnation.

Just this sort of regulation of speech conduct, wherein a State undertakes to threaten by ostensible prohibition a broader range of protected activities than it can constitu-

tionally restrict, has been voided by this Court in numerous contexts other than licensing laws. E.g., *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Its emergence in the licensing area, under the aegis of *Cox* v. *New Hampshire* and the *Walker* decision as construed below, we submit, poses a menace to First Amendment freedoms that this Court should now review.

In saying this, we do not for a moment question the soundness of the basic *Cox* principles: that it is constitutionally permissible for a State or a municipality to require that parades be licensed, under proper standards and procedures; and that persons who parade without the license required by valid legislation may be criminally punished consistent with the Constitution. But, as appears from the decision below, those basically sound principles afford substantial opportunities for abuse, and therefore require at least occasional review by this Court of their administration, so as to assure that they are restricted to their proper compass. We respectfully suggest that the time is now ripe for a review of the question of what limitations must effectively be placed on a municipal licensing scheme in order to bring it within the validating principles of *Cox*, and that the present case presents a peculiarly fit occasion for that review.

For it is clear that what the Alabama Supreme Court has done here is retroactively to validate some 1500 criminal charges, plainly impermissible incidents of an unconstitutional licensing procedure when made, by wrapping them about with the mere verbal habiliments of the *Cox* opinion. Not only does this have the effect of legalizing

the illegal conduct of the Birmingham authorities—and illegalizing the legal conduct of the 1500 Birmingham civil rights demonstrators—in 1963; it also leaves Birmingham Code § 1159 and literally hundreds of cognate statutes and ordinances[12] lying about like so many traps against future free speech activity. Even in the case of § 1159 itself, which now has been given an authoritative if belated limiting construction, the danger of irremediable unconstitutional application remains intense, both because of the gap between the limiting construction and what the face of the ordinance appears to countenance, and because of the absence in Alabama of any administrative or judicial machinery serviceable to make the limiting construction anything more than verbal. And, of course, the danger is greater still in the case of other, similar but as yet unconstrued licensing statutes and ordinances, to which the effect of the decision below is to enforce compliance.

These dangers are apparent upon consideration of the alternatives open to the citizen wishing to participate in a "parade" (assuming *arguendo* that a citizen has fair warning of what constitutes a "parade," see II B, *infra*), under such a statute or ordinance:

1. The citizen can submit to the issuer's discretion and, if his permit application is denied, can attempt to seek review of this denial; or,

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[12] Statutes and ordinances creating broadly discretionary licensing regimes appear to be ubiquitous, notwithstanding this Court's repeated condemnation of them (see note 15, *infra*). The Jackson ordinance condemned in *Guyot* v. *Pierce*, 372 F. 2d 658 (5th Cir. 1967), for example, was a portion of the Uniform Traffic Code. See also, e.g., *Baker* v. *Bindner*, 274 F. Supp. 658 (W. D. Ky. 1967); *King* v. *City of Clarksdale*, 186 So. 2d 228 (Miss. 1966); *Gamble* v. *City of Dublin*, 375 F. 2d 1013 (5th Cir. 1967).

2. The citizen can refuse to make application for a parade permit and attempt to challenge the regime of the ordinance if he is prosecuted for parading without a permit.

The second alternative is plainly foreclosed by the decision below. As we have pointed out, if Birmingham Code § 1159 can be retroactively rewritten and thereby validated by judicial construction in a criminal prosecution, any licensing legislation can. All must therefore be obeyed.

But the remaining alternative—to obey and seek a permit—is an equally repressive requirement, for several reasons. In the first place, a system of enforced compliance with overbroad licensing laws presents no real means of challenging their coercive effect because in practice it preserves wide-open, operative and unchallengeable the discretion in the issuer of parade permits. Alabama is no exception. In Alabama, judicial review is theoretically available by way of mandamus, see Code of Ala., Tit. 7, § 1072, but that remedy is largely ineffective because there is no requirement of dispatch, compare *Freedman* v. *Maryland,* 380 U. S. 51 (1965) and *Teitel Film Corp.* v. *Cusack,* —— U. S. ——, 19 L. ed. 2d 966, January 29, 1968, and because the citizen must overcome a nearly impossible burden of showing that administrative discretion has been abused:

> "To warrant the issuance of mandamus, not only must there be a legal right in the relator, but, owing to the extraordinary and drastic character of mandamus and the caution exercised by courts in awarding it, it is also important that the right sought to be enforced be clear and certain, so as not to admit of any reasonable controversy. The writ does not

issue in cases where the right in question is doubtful. . . . ". *Lassiter* v. *Werneth,* 275 Ala. 555, 156 So. 2d 647, 648 (1963); see also *Ducourneau* v. *Langan,* 149 Ala. 647, 43 So. 187 (1907).

The facts that the administrative decision challenged is not required to be made on a record of regular procedures; or to be supported by any statement of reasons; and that there is not even required to be kept any administrative log or recording of permit grants and denials (R. I, 32), make virtually insuperable the difficulty of proving a case of judicially revisable arbitrary or discriminatory enforcement. This, together with the prospect of delay involved in judicial challenge, makes reversal of the denial of a permit application in any particular case highly unlikely. And, in any event, no general construction of the overbroad permit law is assured by this route; while facial challenge to it is, of course, denied.

But, there is, in the second place, good reason why this Court has long endorsed the principle that citizens should be free to refuse to submit to a licensing scheme which has a coercive effect upon First Amendment rights. These overbroad laws are numerous and their prior restraints affect large numbers of people who cannot be supposed to have the knowledge and resources to combat them by prolonged administrative and judicial challenge. In this case alone, 1500 people were subjected to the prior restraints of the Birmingham parade ordinance. If they had sought parade permits under the ordinance, it was and is speculative what construction would have been put upon § 1159 by the Birmingham authorities or the Alabama courts, or how long the demonstrators would have been in court before obtaining any construction. One thing, we think, is

clear: there would have been no civil rights Easter marches in Birmingham in 1963. It was not heedlessly, we suggest, that *Lovell* v. *Griffin*, 303 U. S. 444, 452-53 (1938) and *Staub* v. *Baxley*, 355 U. S. 313, 319 (1958), stated this Court's preference for allowing challenges to the whole regime created by such overbroad licensing laws. The Court recognized that only by facilitating challenges to the law itself could its coercive sting be removed.

Third, Birmingham Code § 1159, in its effective operation in 1963 and by its language on the books today, *expressly* embodies an unconstitutionally broad grant of censorial licensing power. This was not the case, it should be noted, of the ordinance challenged in *Cox*. The *Cox* ordinance merely provided that licenses for parades and certain other gatherings must be obtained. Not surprisingly, the New Hampshire Supreme Court held that the discretion of the issuer of parade permits was governed by the standard of considerations of time, place and manner in order "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." *Cox* v. *New Hampshire*, 91 N. H. 137, 144, 16 A. 2d 508, 514 (1940), quoted with approval, 312 U. S. at 576. The New Hampshire Supreme Court relied on "the unbeatable proposition that you cannot have two parades on the same corner at the same time"[13] and, of course, this Court agreed.

Thus, the problem not presented in *Cox* but presented here is how to remedy a parade permit law which on its face appears to grant to officials far more discretionary

[13] Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Review, 1, 25.

licensing power than the Constitution allows. The verbal solution offered by the court below—eliminating the standards of "public welfare," "peace," "safety," "health," "decency," "good order" and "morals" and keeping only the standard of "convenience" (R. II, 16; App., p. 8a, *infra*)—is a plainly unsatisfactory remedy, at least as applied in petitioner's case. True, the court below took great pains to chop off the language of the Birmingham parade ordinance and to substitute for it the language of this Court and the New Hampshire Supreme Court in *Cox*.[14] But that disposition—operating *post facto* on the past and with speculative and unassured efficacy for the future—hardly cures the problem. Birmingham's licensers still have the unchanged face of the Code to point to in their dealings with citizens; and if those dealings are abusive, no adequate machinery is available to convert the Alabama Supreme Court opinion below into an effective and enforceable restraint upon the day-to-day reality of the licensing system.

The foregoing considerations put into focus the trouble with the disposition by the court below: it punishes the citizen who, by daring to challenge an overbroad prior restraint, succeeds in having it limited to proper constitutional bounds. This punishment is the reward of that citizen although, in Alabama, his challenge is the only

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[14] The standards stated in the Alabama Supreme Court's opinion are lifted without citation from the New Hampshire Supreme Court's opinion, viz., that the discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use [of the highways]" must be followed (91 N. H. at 143, 16 A. 2d at 513; R. II, 16; App., p. 8a).

effective way to curb the coercive effects of an overbroad prior restraint such as the Birmingham parade ordinance.

We do not see how such a result can be squared with the principle of this Court's *Griffin* and *Staub* decisions. Perhaps in cases where the machinery of administrative decision-making and judicial review is clearly established, effective and timely to restrict broad prior restraints, the *Griffin-Staub* right to be wholly free of those restraints may be abrogated. But that is not the case here. The Alabama Supreme Court may have adopted the *Cox* language; it has not yet adopted *procedures* adequate to insure effective respect for the *Cox* principle of "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" (see note 14, *supra*). Whether, without such procedures, its ostensible conformance to *Cox's* constitutional standards satisfies *Cox* and the Constitution, presents a question of great moment which this court should grant *certiorari* to decide.

II.

Certiorari Should Be Granted to Decide Whether the Decision Below Conflicts With *Bouie* v. *Columbia*, 378 U. S. 347 (1964), Because Petitioner Was Given No Fair Warning That He Was Required to Secure a Parade Permit. A) Because Prior Decisions of This Court Taught Petitioner That He Need Not Submit to a Permit Ordinance Patently Unconstitutional on Its Face and B) Because Petitioner Only Participated in a Peaceful, Orderly and Nonobstructive Walk Along the Sidewalks of Birmingham.

A. Five years ago, petitioner was confronted with a parade ordinance which granted power to Birmingham officials to withhold a parade permit if "in [their] . . . . judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" required it.

Leaving aside the question whether petitioner could foresee that the ordinance had any application to his activities (discussed in II B, *infra*), petitioner had ample authority in the decisions of this Court[15] to be "[u]nable to believe

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[15] *Cox* v. *Louisiana*, 379 U. S. 536, 553-558; *Lovell* v. *Griffin*, 303 U. S. 444, 447, 451; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Schneider* v. *State*, 308 U. S. 147, 157, 163-164; *Cantwell* v. *Connecticut*, 310 U. S. 296, 305-307; *Largent* v. *Texas*, 318 U. S. 418, 422; *Marsh* v. *Alabama*, 326 U. S. 501, 504; *Tucker* v. *Texas*, 326 U. S. 517, 519-520; *Saia* v. *New York*, 334 U. S. 558, 559-560; *Kunz* v. *New York*, 340 U. S. 290, 294; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Staub* v. *Baxley*, 355 U. S. 313, 322-325; *Jones* v. *Opelika*, 316 U. S. 584, 600-603 (Stone, *C. J.* dissenting), 611, 615 (Murphy, *J.* dissenting), dissenting opinions adopted *per curiam* on rehearing, 319 U. S. 103, cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90; *Freedman* v. *Maryland*, 380 U. S. 51, 56.

that such a blatant and broadly drawn prior restraint on . . . First Amendment rights could be valid." [16]

Moreover, petitioner had good reason to believe that the *Griffin-Staub* principle discussed in Part I, *supra,* allowed him to refuse to submit to and then challenge this blatant and broadly drawn prior restraint on First Amendment rights. Even if the Alabama Supreme Court's judicial repealer of § 1159 is held to meet the *Cox* standards, and even if the *Griffin-Staub* principle is held not to shield from punishment those citizens who succeed, by challenging such a blatant prior restraint, in limiting it, at least petitioner and the 1500 other Birmingham civil rights demonstrators arrested in the Easter week, 1963 marches should not be punished for their reliance upon this principle. Punishment of this sort, for conduct expressly validated by long-settled and repeated decisions of the highest Court of the land, would plainly affront the ordinary principles of *mens rea* common to the criminal law. Cf. *James* v. *United States,* 366 U. S. 213 (1961). We submit that it would violate, as well, the rudimentary guarantee of fair notice imposed on state criminal procedure by the Due Process Clause, see *Bouie* v. *Columbia,* 378 U. S. 347 (1964), and urge that *certiorari* be granted to so decide.

B. Petitioner was convicted for taking part in a peaceful protest demonstration consisting of 52 persons walking two abreast in an orderly and nonobstructive manner on the public sidewalks of Birmingham, Alabama. His crime was that he had not obtained a permit from Birmingham authorities to do so.

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[16] *Walker* v. *City of Birmingham, supra,* 388 U. S. at 327 (opinion of Warren, *C.J.*).

In the courts below, petitioner maintained that there was insufficient evidence to sustain the charge that he participated in "a parade or procession on the streets of the city" (Complaint, R. I, 3). Put another way, petitioner denied that he required a parade permit to do what he did.

The Court of Appeals of Alabama agreed, holding (R. I, 116, 118; 180 So. 2d at 139; App., pp. 65a, 67a, *infra*):

> Here, we consider the proof . . . fails to show a procession which would require, under the terms of § 1159, the getting of a permit.
>
> • • • • •
>
> We emphasize that we have only before us a walking on city sidewalks. In the use of the roadway probably less stringent standards of construction would prevail against the prosecutor.

This holding was fully consistent with the history of the operation and enforcement of § 1159. The permit-issuing authorities did not issue permits for walking on the sidewalk (R. I, 33). The police did not usually arrest persons for walking on the sidewalks; when they did, the courts did not sustain such convictions.[17]

Notwithstanding the prior operation, enforcement and construction of § 1159, the Supreme Court of Alabama held that there *was* sufficient evidence of a "parade" to constitute a violation of the ordinance (R. II, 21; App.,

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[17] See *Primm* v. *City of Birmingham*, 42 Ala. App. 657, 177 So. 2d 326 (Ct. App. Ala. 1964).

p. 12a; *infra*).[18] In doing so, the court below brought itself into conflict with the doctrine of *Bouie* v. *Columbia*, 378 U. S. 347 (1964).

In *Bouie*, the Court held violative of the due process clause of the Fourteenth Amendment convictions under a statute which had been "unforeseeably and retroactively expanded by judicial construction" (378 U. S. at 352). Prior to the Supreme Court of Alabama's decision in this case, the term "parade" had a fairly certain meaning in Birmingham. A "parade" included bands and vehicles (R. I, 33); it occurred in the streets, not on the sidewalks (R. I, 33); it contained, the ordinance assumed, "persons, vehicles and animals."

Otherwise, there would be little justification for having a permit system at all. A permit system is justified by the fact that a person wishing to hold a "parade", in the accepted sense, i.e., with bands and/or vehicles, requires the *exclusive* enjoyment of particular streets at a particular time. A permit system gives "the public authorities notice in advance so as to afford opportunity for proper policing" (*Cox* v. *New Hampshire*, *supra*, 312 U. S. at 576).

That rationale has no application here. It is undisputed that petitioner's use of the sidewalks of Birmingham at approximately 2:15 p.m. on April 12, 1963, was in no way inconsistent with the use by other citizens of Birmingham of those very same sidewalks at that very same time. The Court of Appeals correctly held (R. I, 117; 180 So. 2d at 139; App., p. 66a, *infra*):

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[18] "We see no occasion to deal at length with the holding . . . [below] that the evidence was insufficient to show that Shuttlesworth had engaged in a parade . . . " (R. II, 21; App., p. 12a, *infra*).

> The City failed to show whether or not other pedestrians were run off the sidewalk, blocked either in access, process or transit.[19]

Having reference then to the theory and practice of the Birmingham parade ordinance, petitioner had no fair warning that his participation in a peaceful, orderly and non-obstructive walk on the sidewalks of Birmingham required a parade permit.

Petitioner may now be on notice for the future. It may now be that football fans on their way to the stadium without a parade permit risk prosecution under § 1159, should city authorities "choose so vigorously to protect the sidewalks of Birmingham."[20] Whether or not[21] that is now the state of the law, one thing is clear: The court below's unforeseeable and retroactive application of the Birmingham parade ordinance to petitioner appears inconsistent with *Bouie* v. *Columbia, supra.*

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[19] Cf. *Cox* v. *New Hampshire, supra,* 312 U. S. at 573:
> The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred.

[20] *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 100 (1965) (concurring opinion of Fortas, *J.*).

[21] "If one were to confine oneself to the surface version of the facts, a general alarm for the people of Birmingham would be in order. Their use of the sidewalks would be hazardous beyond measure.". *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 101 (1965) (concurring opinion of Fortas, *J.*).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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